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ORIGINAL

Before The
Surface Transportation Board

STB Ex Parte No. 656
Motor Carrier Bureaus—Periodic Review Proceeding

Reply Comments
Of
Southern Motor Carriers Rate Conference, Inc.
Section 5a Application No. 46

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Table of Contents

I.
Reply Statement
Of
Jack E. Middleton
President and CEO of
Southern Motor Carriers Rate Conference, Inc.

I.
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Southern Motor Carriers Rate Conference, Inc.

My name is Jack E. Middleton and I am the President and Chief Executive Officer of Southern Motor Carriers Rate Conference, Inc. (SMC). This statement is submitted in response to allegations and incorrect assertions regarding the conduct of collective ratemaking activities by SMC member motor carriers set forth in the joint Opening Comments of the National Small Shipments Traffic Conference, Inc. (NASSTRAC) and the National Industrial Transportation League (NITL) (collectively the Shipper Associations).

The thesis for the Shipper Associations' opposition to the continuation of antitrust immunity for motor carrier collective ratemaking agreements is that those collective activities somehow impair competition. Not a single fact corroborating that serious allegation is presented. The significance of the absence of any evidence on that critical assertion is heightened by the fact that it is refuted by the vast array of shipper evidence which was introduced in support of SMC's pending application for nationwide collective ratemaking authority in Section 5a Application No. 46 (Sub-No. 20). Some 191 shippers, including the North Carolina Traffic League and members of NASSTRAC and NITL, supported the December 1996 filing. Moreover, as was pointed out in the April 21, 2004 statement of Danny B. Slaton, SMC's Vice President, Sales & Marketing, in the reopened proceeding on the nationwide collective ratemaking application more than 80 of NITL's shipper member companies use CZAR-Lite as the base class rates in their LTL pricing strategies.[1] Over 60 of NASSTRAC's member shippers also rely on the collectively-made class rates in CZAR-Lite as their baseline pricing mechanism.[2] Also, many of the associate motor carrier members of both shipper associations rely on CZAR-Lite for pricing their transportation services. (See April 21, 2004 Statement of Danny Slaton, pp. 5-6)

[1] Those NITL member shippers include Weyerhaeuser Company, American Standard, Rexnard Corporation, General Electric, Atonfina Chemicals, Baldor Electric, Emerson Electric, Kraft Foods, Kellogg Company, Nestle USA, Olin Corporation, Philip Morris, Sears Logistics, Sara Lee, Rohm and Haas Company, and many others.
[2] Those NASSTRAC shipper members include Parker Jannifan, Pioneer Electronics, Bose Corporation, Corning, Inc., Eveready Battery Corp., Fisher Scientific Co., Hallmark, Harley Davidson, ITW Devcon/Plexus, Maytag Co., Moen Corp., Selection, Inc., Spring Industries, Wellman, Inc. and many others.

In addition, statements in support of SMC's application in the reopened nationwide collective ratemaking proceeding were submitted by NITL members MASCO Corporation, Continental Traffic Service, Inc., Emerson Electric Co., Hewlett Packard and Trinity Transport, Inc. Members of NASSTRAC included, as well, Gambro and Continental Traffic Service, Inc. Obviously, the Shipper Associations' views, stated by counsel, are not shared by a substantial body of their shipper and associate members. The absence of any evidence demonstrating how collective ratemaking, in this recognizably highly competitive transportation market, is "actually or even potentially anticompetitive" (SA Comments, p. 4), requires that such self-serving allegation be given no weight—particularly in light of identified shipper and associate member statements not supporting that contention.

The Shipper Associations maintain, for the self-serving purposes of this proceeding, that collective activities by the rate bureaus "continue to influence motor carrier ratemaking in ways that distort the competitive market." (SA Comments, p. 4) That position is markedly different than prior representations made to the Surface Transportation Board. For example, in NASSTRAC's January 22, 2002 Reply to Rate Bureau Petitions for Reconsideration in Section 5a Application No. 118 (Sub-No. 1), et al., EC-MAC Motor Carriers Service Association, Inc. Et Al., it stated that:

> NASSTRAC has acknowledged that there can be pro-competitive aspects of motor carrier ratemaking based on discounts off class rates, especially in today's environment of widespread contracting. (NASSTRAC Reply, p. 3)

Further, in the May 24, 2004 Reply Comments of NASSTRAC in Section 5a Application No. 46 (Sub-No. 20), Southern Motor Carriers Rate Conference, Inc., counsel stated that:

> Today's trucking industry is characterized by intense competition, generally reasonable rates, generally excellent service, and a level of responsiveness to customers that far exceeds what railroads and water carriers manage to provide. Since 1980, more efficient motor carriers and more efficient shippers working together, have produced a more efficient distribution system benefiting the entire American economy. (NASSTRAC Reply, p. 3)

Given those representations, the Shipper Associations' unsubstantiated contentions that somehow collective ratemaking between then and now has become anticompetitive lacks credibility.

The Shipper Associations, in an obvious misstatement of the classification and collective ratemaking processes, attempt to have it appear that the member motor carriers of the National Classification Committee and of the rate bureaus combine their collective efforts to facilitate "stealth" rate increases. (SA Comments, pp. 4-7) That fictionalized contention is incorrect, on its face, and the freight classification ratings and class rates do not have the relationship alluded to by the Shipper Associations.

The Shipper Associations attempt to make it appear that the freight classification and the class rate structure act in tandem with the rate bureaus using classification changes to enhance collective ratemaking activities. (SA Comments, pp. 4-7) As is well settled, the freight classification and collective ratemaking activities are entirely separate and distinct functions. As the former Interstate Commerce Commission concluded in Charge For Shipments Moving On Order—Notify Bills, 367 I.C.C. 330, 335 (1983):

> The classification tariff and the class tariff, although complementary, serve entirely different purposes. While the classification is designed to reflect the characteristics of the commodity transported, the class tariff reflects the characteristics of the haul. Specifically, the class tariff establishes the rate relationship between localities based upon weight and distance.

Moreover, in Investigation Into Motor Carrier Classification, 367 I.C.C. 243, 248-49 (1983), the ICC concluded that the former elements of trade conditions, value of service and competition with other commodities, were economic factors not related to the transportability of commodities, but were more properly considered by the ratemaker. Thus, those factors could no longer be considered by the classifier. Therefore, the contrived relationship that the Shipper Associations attempt to create between the separate activities of the classification maker and the ratemaker simply does not exist.

Equally flawed is the Shipper Associations' contention that an increase in a classification rating is the stimulus for a general rate increase (GRI) used to increase a class rate level. (SA Comments, p. 6) As was noted by the ICC in the Order—Notify proceeding, GRIs are distributed over the weight brackets and distances, and are not tied to the classification rating.

These are totally distinct functions based on factors wholly unrelated; class ratings are assigned based on the transportability of a commodity in the carrier's vehicles, and GRIs are based on economic considerations related to the carriers' industry average costs.

The Shipper Associations, without a single substantiating fact, then engage in a series of hypothetical and generalized problems created for shippers by collective ratemaking activities. Interestingly, one of the points made is a repeat of a contention previously raised before and rejected by the Board. It is argued that:

> Even the largest shippers, who are able to negotiate contracts protecting them against most such increases, are not totally protected. Large and knowledgeable shippers with contracts may nevertheless receive bills for full undiscounted class rates. This may happen, for example, when a customer returns an item, at the manufacturer's expense, using a carrier with which the manufacturer has no discount agreement. (SA Comments, pp. 6-7)

That very contention was discredited by the Board in its Decision served on November 20, 2001 in STB Section 5a Application No. 118 (Sub-No. 2), et al., EC-MAC Motor Carriers Service Association, Inc. Et Al., wherein it found that:

> The shippers complain that even sophisticated shippers can be charged above-market rates when, for example, a customer returns a shipment via a carrier with which the original shipper (now the receiver of the returned goods) has not negotiated a discount for such return shipments. But the truth-in-rates notice should at a minimum alert all motor carrier customers to the fact that the rate quoted may not be the prevailing market rate. To avoid a situation where a customer that is not paying for the transportation may not care what rate is charged, the original shipper can protect itself by providing that it will select the carrier to be used if there is a customer return. (Emphasis added) (Decision, p. 8, fn. 18)

The Shipper Associations have not shown that the Board's finding did not provide a simplistic solution to the theoretical problem raised. Merely repeating that contention does not validate any problem.

Again, without any specificity, the Shipper Associations contend that "some shippers may never even know that motor carriers, acting collectively with antitrust immunity, have raised the shippers' rates." And that "other shippers may notice the rate increases but may be unable to avoid them because of the time needed to negotiate adjusted discounts or to find substitute carriers." (SA Comments, p. 6) Certainly, the truth-in-rates notice apprises any shipper that the rates quoted have been collectively made with antitrust immunity. So too, the

range of discounts available is made known to those shippers and they are made aware that the quoted rate may not be the prevailing market rate. In today's highly competitive market, it is unlikely that shippers are not frequently solicited for business by competing motor carrier sales personnel. Hence, there should be little problem in quickly being able to locate substitute motor carrier services. Similarly, it is unlikely that shippers are unaware of SMC's general rate actions. As NASSTRAC stated in its November 25, 2003 Reply in Section 5a Application No. 46 (Sub-No. 20), Southern Motor Carriers Rate Conference, Inc.:

> ...NASSTRAC has in the past expressed general support for nationwide authority, reflecting its belief that competition among rate bureaus is desirable, and its recognition of a number of forward-looking initiatives adopted by SMC. Those include associate membership status for shippers (including a number of NASSTRAC members), and SMC's practice of holding open meetings which shippers may attend. (NASSTRAC Reply, p. 2)

Given that acknowledgment by NASSTRAC, the Shipper Associations' allegation that general rate actions are established "through collective, and largely secret, carrier actions," is indefensible, and contradicted by the admission that SMC conducts open meetings accessible to any interested person. (SA Comments, p. 11) Similarly contrived, and wholly unsupported is the contention that because fewer shippers maintain large traffic departments, "the number of shippers vulnerable to little known and poorly, understood collective carrier action immune from the antitrust laws" has increased. (SA Comments, p. 12) As even NASSTRAC admits, SMC has taken many initiatives, incurring considerable additional costs and administrative burdens for SMC, to inform shippers of the basis for its member carriers' general rate actions.

For example, SMC distributes over 5,000 copies of its White Paper, in addition to information on its website, in its weekly information bulletins, and press releases, explaining the basis for the general rate actions to its member motor carriers, to shipper associations, including NITL and NASSTRAC, to individual shippers and transportation intermediaries, including SMC's over 1,200 associate members, and to motor carriers. Included among the persons provided notice of SMC general rate committee meetings are representatives of NITL and NASSTRAC, neither of which organizations notwithstanding repeated personal invitations have

attended any GRC meetings to understand how the process works under SMC's approved Section 5a procedures. If they had they would be aware that shippers and any other person attending the meeting are provided the very same information, including the results of labor, insurance and security surveys, updated labor and non-labor costs, and other relevant data, as is provided to the carrier members. Not only are shippers and others able to follow discussions based on that information, they are encouraged to make their views known to the carrier members. To accuse that process of being "largely secret" is utterly lacking in candor.

The contention that SMC, as well as the other rate bureaus, "should provide fuller advance notice to the public of the basis for proposed increases in bureau class rates," betrays an obvious lack of understanding of the collective ratemaking process. Prior to the initial meeting of the carrier members of the GRC, and even before the docketing of a proposal, advance notice exceeding the requirements in SMC's Section 5a Agreement is provided to the public. Promptly after the GRC dockets a proposal that information immediately is published in the weekly information bulletin which is distributed by mail and is provided to shippers and carriers alike, and is placed on SMC's website so that it is accessible to the public. Notice is provided at a minimum of 15-days before the public meeting is held on the docketed proposal. Further, SMC issues a press release providing information on the docketed proposal which is sent to some 25 industry publications and websites covering all segments of the transportation industry. The entire collective process as administered by SMC is totally open to the public, and participation and input is encouraged at all stages of the General Rate Committee's consideration of the proposed collective action.

Respectfully submitted,

Jack E. Middleton
President & CEO
Southern Motor Carriers Rate Conference, Inc.

II.
Reply Statement
Of
Daniel M. Acker
Vice President of Operations of
Southern Motor Carriers Rate Conference, Inc.

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I am the same Daniel M. Acker who filed a statement on behalf of Southern Motor Carriers Rate Conference, Inc. (SMC) in its opening comments. This statement is submitted in response to contentions made in the joint comments of the National Small Shipments Traffic Conference, Inc. and the National Industrial Transportation League (Shipper Associations). The Shipper Associations on page 4 of their joint comments make reference to the "motor carrier collective action that are holdovers from the era of cartel-based pricing." Cartels are a combination of independent commercial enterprises designed to limit competition. It seems that the Shipper Associations have overlooked the fact that the collective activities of rate bureaus, then and now, are conducted under operation of the law. Prior to the 1980s, the Interstate Commerce Commission (ICC) was charged with the responsibility of reviewing all motor carrier rates and rate changes for the motor carrier industry. This duty was effectuated by the ICC staff of rate experts who reviewed, suspended or approved rate changes for the motor carrier industry based on the statutory requirements of law. While these responsibilities have changed, again, by legislation, class rates must still be reasonable. Class rates were subject to review by the ICC until 1996, and are now subject to review by the Surface Transportation Board. Statements equating SMC with a pricing cartel, when SMC and the other rate bureaus were operating within the law, is evidence of the unfamiliarity the Shipper Associations have with the past and current regulatory environment. As has been demonstrated, the purpose and effect of the collectively established class rate baseline are to foster competition and create competitive pricing among the carriers to the public benefit, and not the fixing of prices.

The Shipper Associations continue with that misconception when on page 5 they state that "for their part, the regional rate bureaus take the commodity class ratings adopted by the NCC and publish class rates, which correspond to the class ratings." The NCC does, in fact, establish the class ratings of commodities; however these class ratings are based on the transportability of the article being classified. Once the article is classified it is subject to the class rates already in effect; new class rates are not created for each new commodity as

purported. To further clarify the process, the NCC is a committee of approximately 90 motor carrier members and is a separate and distinct group from any other bureau. The membership of the NCC is not the same as the members of the various regional rate bureaus, even though a carrier could be a member of the NCC and a rate bureau.

The Shipper Associations continue to misconstrue actual events when they allude to the "undiscounted baseline class rates" as contributing to the "undercharge epidemic." They would lead you to believe that discounts caused the epidemic. Factually, the cause of the undercharge epidemic was the failure of the carriers to file their discounts with the ICC, and failure of the shippers to demand verification from the carriers they were paying the legal and lawful rate.

Having filed General Rate Increases with the ICC subject to the rate justification requirements of Ex Parte MC–82, I can vouch for the review process which those increases were subjected to by that agency. The ICC, with their knowledgeable staff, understood the workings of Class, Commodity and Column Commodity rates. They also understood, reviewed, and approved the rate bureaus filings. The class rates in question in the "undercharge epidemic" were never found to be uncompetitive, unreasonable, or contrary to the public interest. This is contrary to the erroneous allegations made by the Shipper Associations that these rates "were consistently found unreasonable by the ICC." The ICC determined that on the subject shipments the discounted rates originally applied on that traffic were the appropriate charges and that the higher, undiscounted class rates were not appropriate. There was no determination that the undiscounted class rates were "unreasonable" in terms of the long accepted standards applied by the ICC in accessing the lawfulness of class rates. Stated differently, it was not found that the undiscounted class rates at issue exceeded the maximum reasonable level based on the relationships of those rates to general rate standards upon which class rates are assessed.

There is considerable discussion by the Shipper Associations on the perceived desire of the NCC to increase the classification of various items to merely increase the transportation charges to the shipper. The class rating is assigned based on the recognized transportation characteristics of density, loadability, stowability and liability. As numerous consumer goods become smaller and lighter through the use of plastics instead of metal, and packaging becomes lighter through the use of Styrofoam and bubble pack instead of cardboard, the density of numerous products have decreased, affecting the products transportation characteristics. This is a fact of modern life, not a conspiracy to force transportation charges upward.

On page 15 of their joint comments, the Shipper Associations list the NATIONAL CLASSIFICATION COMMITTEE DENSITY GUIDELINES and make the "observation" that it is a non-linear scale. They then go on at length about the allegedly skewed standards "in favor of carriers and against shippers." If one looks at the revenue from the shipper side and the costs from the carrier side the relationship is quite straightforward and is not adverse to shipper interests.

Before accusations fairly can be made as to whether or not the rates are to the benefit of the carrier or shipper, one must understand the carriers' operational considerations. By tendering freight to a carrier, the shipper presents physical constraints that the carrier must address in providing the service the shipper has requested. A motor carrier has two physical restraints they must address to provide service; namely, the maximum legal weight that can be loaded in a trailer and the physical internal volume of a van trailer. If a carrier is to remain in business it must price its services in a manner that will allow the carrier to recover the costs it has incurred in providing that service and make a reasonable profit. A typical trailer today has a weight capacity of 45,000 pounds and an internal volume of 2,592 cubic feet. Very dense freight will cause the weight limit to be met prior to the volume limit, and, conversely, very light, high volume low density freight will fill the volume limit quickly. Wherever the carrier operates within these two extremes, the rate must be calculated that will allow the carrier to generate the required revenue. The classification or class rating of an article relates to the transportability of the article. The pricing of freight services by motor carriers covers the operational costs, equipment, transit time, geographical and revenue considerations, to name a few that must be addressed by a carrier or any other business that is to remain a going concern. To insinuate that because a scale, in this case density vs. class, is non-linear it is automatically beneficial to carriers and detrimental to shippers is ludicrous and misleading.

Exhibit 1 has been prepared to show the impact of density on the rate per hundredweight by NMFC classification. As mentioned above the carrier must operate within the constraints of trailer weight (payload) and interior volume. To facilitate this example, presume that one commodity of the appropriate class is being shipped and it fills the trailer either to the weight or volume limit of the trailer. Column 6 shows the operational weight of each class or the maximum weight that can be transported since the volume limit was reached. As the class increases, the operational weight decreases based on the density. In column 8, as an example,

the rate per hundredweight is computed that will generate $1,000 from the truckload shipment. Since motor carrier rates are based on hundredweight, the rate must rise as the actual weight decreases to generate the hypothetical target of $1,000 revenue for the shipment. Column 10 depicts the relationship of each rate in column 8 compared to class 100. It is interesting to note in column 10 the relationships of the individual class rates to the class 100 rate. If density were strictly followed in computation of the class rates, class 500 would be 1800% of the class 100 rate instead of approximately 500% of the class 100 rate as it is in our tariffs.

To imply that the classification or the transportability of freight must reflect a linear relationship to the pricing of the motor carrier services is totally unfounded, and in this example, would result in an increase in current class 500 rates of approximately 1200%. Operational pricing of freight is beneficial to both the shipper and the carrier, resulting in an arms length transaction where the shipper and the consumer are the benefactors of operational pricing, rather than a mathematical linear rationship as proposed by the Shipper Associations.

On page 12 of their comments, the Shipper Associations claim that antitrust immunity for collective action should not extend beyond cost recovery to profit enhancement. Even after the enactment of the Motor Carrier Act of 1980, the Interstate Commerce Commission exercised economic regulation of motor carrier rates until that agency's termination in 1996. As indicated, that economic regulation was encompassed in Ex Parte No. MC – 82, which specifically allowed the carriers to recover their increased costs and a reasonable profit for the purpose of continued operations. The Shippers Associations' myopic view of motor carrier costing as recovering only costs without any contribution to profit ultimately would lead to the demise of the carriers to the direct detriment of the shippers. They apparently do not recognize that the motor carrier Operating Ratio reflects the Revenue and Expense of the carriers before interest and taxes. In the short run it may appear sound that the carriers only recover their costs, but the carriers as well as the members of the Shipper Associations would pay a ruinous price as carriers cannot finance their continued operations on a portion of their expenses. A simple example will illustrate my point.

	Year 1	An Increased Expense of 5%	Year 2
Revenue	$10,000,000	$500,000	$10,500,000
Expense	$9,500,000	$500,000	$10,000,000
Operating Ratio	95.00%		95.24%

With this example it is easy to see that the mere pass through of expense increases will cause erosion of the operating ratio in each year that it occurs, eventually leading to bankruptcy. By ignoring the fact that the mere pass through of expenses will lead to carrier bankruptcy, the Shipper Associations are asking the STB for the demise of the very industry that provides their membership with the transportation services critical to their own survival. The Shipper Associations either do not understand basic economics or the concept of an on-going business when they propose such a remedy as a workable solution to reduce their members' expenses.

Respectfully submitted,

Daniel M. Acker

Exhibit 1

EXAMPLE OF THE IMPACT OF DENSITY ON COMPUTATION OF THE RATE PER HUNDREDWEIGHT BY NMFC CLASSIFICATION

Line No.	NMFC Density	NMFC Class	Trailer Cubic Volume	Trailer Max Weight	Trailer Weight Capacity	Trailer Operational Weight	Trailer Unused Wt. Capacity	Rate per CWT $1,000 Per Trl.	Calculated Rate Progression	CL 100 % Rate Progression	% Weight Usage	% Weight Reduction	Shipment Revenue
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
1 .	50	50	2,592	129,600	45,000	45,000	0						
2 .	35	55	2,592	90,720	45,000	45,000	0						
3 .	30	60	2,592	77,760	45,000	45,000	0						
4 .	22.5	65	2,592	58,320	45,000	45,000	0	2.22	100.00%	51.84%	100.00%	0.00%	$1,000
5 .	15	70	2,592	38,880	45,000	38,880	-6,120	2.57	115.74%	60.00%	86.40%	-13.60%	$1,000
6 .	13.5	77.5	2,592	34,992	45,000	34,992	-10,008	2.86	128.60%	66.67%	77.76%	-22.24%	$1,000
7 .	12	85	2,592	31,104	45,000	31,104	-13,896	3.22	144.68%	75.00%	69.12%	-30.88%	$1,000
8 .	10.5	92.5	2,592	27,216	45,000	27,216	-17,784	3.67	165.34%	85.71%	60.48%	-39.52%	$1,000
9 .	9	100	2,592	23,328	45,000	23,328	-21,672	4.29	192.90%	100.00%	51.84%	-48.16%	$1,000
10 .	8	110	2,592	20,736	45,000	20,736	-24,264	4.82	217.01%	112.50%	46.08%	-53.92%	$1,000
11 .	7	125	2,592	18,144	45,000	18,144	-26,856	5.51	248.02%	128.57%	40.32%	-59.68%	$1,000
12 .	6	150	2,592	15,552	45,000	15,552	-29,448	6.43	289.35%	150.00%	34.56%	-65.44%	$1,000
13 .	5	175	2,592	12,960	45,000	12,960	-32,040	7.72	347.22%	180.00%	28.80%	-71.20%	$1,000
14 .	4	200	2,592	10,368	45,000	10,368	-34,632	9.65	434.03%	225.00%	23.04%	-76.96%	$1,000
15 .	3	250	2,592	7,776	45,000	7,776	-37,224	12.86	578.70%	300.00%	17.28%	-82.72%	$1,000
16 .	2	300	2,592	5,184	45,000	5,184	-39,816	19.29	868.06%	450.00%	11.52%	-88.48%	$1,000
17 .	1	400	2,592	2,592	45,000	2,592	-42,408	38.58	1736.11%	900.00%	5.76%	-94.24%	$1,000
18 .	0.5	500	2,592	1,296	45,000	1,296	-43,704	77.16	3472.22%	1800.00%	2.88%	-97.12%	$1,000

Definitions:

Column

1 and 2, from page 15 of the Shipper Association comments

3 The cubic foot capacity of a 45 foot trailer with 10% broken stowage.

4 The maximum weight that could be loaded in 2,592 cubic feet of space at the density in column 1

5 The maximum weight capacity of a trailer of this size is approximately 45,000 pounds

6 Taking into consideration the maximum weight that could be handled in column 4 this is the actual weight that a carrier can haul.

7 The underutilized weight capacity of the trailer caused by the physical limitation of 2,592 cubic feet filled by the low density high volume freight.

8 If you assumed the carriers revenue was $1,000 for this shipment from point A to B the rate per hundredweight(CWT), based on the weight in column 6 would be this amount.

9 This is the percentage progression of the rates in column 8, based on the $2.22 as 100%

10 This is the percentage progression of the rates in column 8, based on the line 9, class 100 rate as 100%

11 The percentage of the weight limitation (45,000 pounds) that is utilized by the class of freight in column 2

12 The percentage of the weight limitation (45,000 pounds) that is unused and not available due to the low density high volume freight from column 6

13 The revenue earned by the carrier and paid by the shipper for movement of this trailer (column 6 times column 8)

III.
Argument

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Argument

A. The Shipper Associations Have Failed To Identify The Issue Properly Before The Board In This Proceeding.

The Shipper Associations erroneously allege that "the issue presented by this proceeding and its predecessors is whether it is in the public interest to permit such rate increases through collective carrier action with antitrust immunity, or whether it is better to rely primarily or exclusively on rate increases negotiated at arms length by individual carriers and shippers." (SA Comments, p. 7) This proceeding is not an inquiry into whether motor carriers should be able to collectively establish through routes and joint rates and/or rate adjustments of general application. That authorization, subject to Board approval of the agreement by which those activities are conducted, is provided for by Congress in Section 13703 of 49 U.S.C. This proceeding, and the issue under review, is whether, pursuant to Sections 13703(c)(1) and (2) of 49 U.S.C., the Board should change the conditions of approval or terminate an agreement because such action is "necessary to protect the public interest."

It is submitted that the redundant arguments of the Shipper Associations, already considered and/or rejected in prior proceedings involving the motor carriers' Section 5a Agreements, have not identified a single issue which demands further intervention in the recently approved collective ratemaking procedures, or which has been shown to be necessary to protect the public interest. Whether antitrust immunity is favored or not favored is not a determining factor in assessing the necessity for additional conditions in the conduct of collective activities. As long as SMC's Section 5a Agreement meets the requirements of the National Transportation Policy, the law entitles the collective ratemaking actions of its motor carrier members to antitrust immunity. As stated, the Shipper Associations raise no new matter not previously considered by the former ICC and the Board which evidences the need to modify SMC's current Section 5a Agreement.

B. The Shipper Associations Have Not Presented Any Evidence Rebutting The Presumption That SMC's Section 5a Agreement Is In The Public Interest.

Since the enactment of the Motor Carrier Act of 1980, Congress has sought to ensure the continuation of motor carrier collective ratemaking activities by the enactment of mandatory

presumptions designed to continue antitrust immunity for Section 5a Agreements. Under former Section 10706(b)(3) of 49 U.S.C., a Section 5a Application had to be approved by the ICC if the Agreement "fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title." (See former Section 10706(b)(2) of 49 U.S.C) Compliance with the statutory requirements gave rise to the presumption that the Agreement was in the public interest, which fact could only be rebutted by a showing of inconsistency with the National Transportation Policy (NTP). In addressing the impact of that presumption the ICC acknowledged that "it is apparent a substantial change in the burden of proof associated with the approval of rate bureau agreements has been mandated by Congress." (See Motor Carrier Rate Bureau—Imp. Of P.L. 96-296, 364 I.C.C. 464, 466 (1980))

In the Interstate Commerce Commission Termination Act of 1995, Congress continued the applicability of a statutorily-created presumption, mandatory in terms, regarding the continuation of antitrust immunity for a Section 5a Agreement. While the continuation of a Section 5a Agreement had to be requested three years after approval, Congress required that "the Board shall approve the renewal unless it finds that such renewal is not in the public interest." (Section 13703(d) of 49 U.S.C.) The presumption that the Section 5a Agreement is in the public interest was to prevail unless there was a clear and unequivocal showing that the collective ratemaking activities were not in the public interest.

The Motor Carrier Safety Improvement Act of 1999 rescinded the automatic termination which had been provided in former Section 13703(d) of Section 5a Agreements after three years unless renewed by the Board. Rather, under newly-created Section 13703(c)(2), the STB is only required to conduct a periodic review of Section 5a Agreements during every five-year period commencing with the effective date of that Act. Importantly, in Section 13703(c)(1) Congress has prescribed that in reviewing those Agreements further agency action must be shown as "necessary to protect the public interest." The burden of proof necessary to trigger that finding must be substantial and not rest on bare allegations or unsubstantiated assertions. See New York Life Ins. Co. v. Ganer, 303 U.S. 161, 58 S. Ct. 500 (1938).

SMC's current, revised Agreement was finally approved by the Board in October 2003,. There is no evidence on this record even alleging that SMC's member carriers have not strictly followed the procedures approved in Section 5a Agreement No. 46 (Sub-No. 21), or that any of

its collective activities in any way have impaired the goals of the National Transportation Policy. Therefore, no sound reason exists for changing the collective procedures under which SMC operates, much less deny its member carriers the authority provided in 49 U.S.C. Section 13703 to engage in collective ratemaking activities.

The Shipper Associations' contention that "there should be no rebuttable presumption in favor of continued collective ratemaking" (SA Comments, p. 10), ignores the fact that the presumption arises under the statute. In every review of the motor carriers' Section 5a Agreements, the ICC and the STB have found that, as modified, those Agreements serve the public interest. The presumption is well founded in the law and in fact, and it is not enough for the Shipper Associations to argue that the carriers derive an "enormous advantage" from that presumption. It is their burden to rebut that presumption, and that burden is not met by their totally unsubstantiated allegation that the resulting "increases represent significant distortions of the competitive market." (SA Comments, p. 10) Not a single fact has been introduced on this record, or in any of the other rate bureau reviews, giving any credibility or substance to that claim. To the contrary, many shipper, transportation intermediary, and carrier statements submitted in SMC's Section 5a Agreement No. 46 (Sub-No. 20) and (Sub-No. 21) proceedings document the competitive benefits flowing from the use of the collectively-established baseline of class rates as a principal pricing mechanism in this highly competitive transportation market. Conspicuously, the Shipper Associations have never undertaken any challenge of that evidence.

C. The Shipper Associations' Contention That, With The Demise Of The Filed Rate Doctrine, STB Rate Jurisdiction Over Rate Reasonableness Is Restricted, Is Incorrect Regarding Collectively Established Class Rates.

Contrary to the Shipper Associations' contention, nothing changed with respect to Board jurisdiction over the reasonableness of collectively-established class rates under either the Trucking Industry Regulatory Reform Act of 1994 or the Interstate Commerce Commission Termination Act of 1995. (SA Comments, p. 8) While there may be no recourse over individually determined rates before the Board, Section 13701(a)(1)(C) of 49 U.S.C. requires that "rates, rules and classifications made collectively under agreements approved pursuant to section 13703" must be reasonable. Under Section 13701(b) it is provided that if a violation of the reasonableness requirement of Section 13701(a) is found, "the Board shall prescribe the rate, classification, rule, practice, through route, or division of joint rates to be applied for such

transportation or service." Plainly, the Board's jurisdiction over the reasonableness of collectively-established rates is not restricted as the Shipper Associations suggest.

Indeed, in 1999, NASSTRAC protested the general rate actions of several bureaus, other than SMC, and the Board ordered the suspension and investigation of those proposals. Those proceedings were discontinued only after those bureaus agreed to provide an automatic discount to shippers. Obviously, shippers do have recourse to the Board to object to general rate increases, and the agency has broad powers with regard to the reasonableness of those collective rate actions.

D. The Shipper Associations' Restated Opposition To Antitrust Immunity Is Not Material To The Issue Before The Board.

The Shipper Associations reiterate their institutional opposition to antitrust immunity, and contend that, in their view, it is no longer needed. (SA Comments, p. 9) They further contend that the Board should eliminate or condition the rate bureaus' antitrust immunity. (SA Comments, pp. 10-11) Neither contention is material to this proceeding.

The Board's role in this review is not to grant, rescind or condition the antitrust immunity attendant to an approved Section 5a Agreement. Rather, as indicated, pursuant to Section 13703(c)(1) and (2), this review is to determine whether any further modification or termination of the existing and recently approved Section 5a Agreements is necessary to protect the public interest. Thus, the issue is whether the Section 5a procedures require revision or termination to protect some identified public interest, and not whether antitrust immunity is considered beneficial or a detriment as the Shipper Associations appear to argue. In fact, the role of the agency regarding changes to Section 5a Agreements is clearly defined in Section 13703(c) of 49 U.S.C., entitled Conditions, which provides that:

> The Board may require compliance with reasonable conditions consistent with this part to assure that the agreement furthers the transportation policy set forth in section 13101.

The focus of this proceeding, therefore, is the relationship of the Section 5a Agreements to the National Transportation Policy, and not the opinions of some challenging the Congressional

vesting of antitrust immunity for the collective ratemaking activities conducted under such approved Section 5a Agreements or the need for such immunity.

E. The Shipper Associations Offer Absolutely No Justification For Their Renewed Requests For "Reforms" Rejected By The Board.

The Shipper Associations simply go too far in alleging that class rates collectively made are the products of "largely secret, carrier action." This "say anything" approach is not entitled to serious consideration by the Board. As noted, there is no secrecy whatsoever associated with SMC's General Rate Committee's collective actions during the public meetings where all persons in attendance are provided the same information as is considered by the member motor carriers. Thereafter, through its website, trade publications and White Paper the transportation community is fully advised of the General Rate Committee's action on the proposed docket, and the basis for that action.

Having failed to convince the Board previously that there should be a rollback of the collectively-established class rates, with NASSTRAC itself at that time convincing the Board that there would be a "substantial disruption that would result if the basic framework for doing business were changed," the Shipper Associations attempt a new tactic. (See November 20, 2001 Decision in the consolidated rate bureau proceeding, pp. 5-8) They request that the Board, without any record evidence, "adopt a rebuttable presumption of the unreasonableness of full undiscounted class rates, if antitrust immunity for rate bureaus is to continue." (SA Comments, p. 11) This is not an appropriate matter for consideration in this proceeding. As the Board noted in the November 20, 2001 Decision:

> Because we are aware of no suitable and readily available methodology, and because of the disruption that a broad class rate reduction order could produce, we will not require broad rollbacks of collectively set rates at this time. (At p. 6)

How would the creation of a presumption of unreasonableness of the class rates which underpin the discounting practices of a major segment of the transportation community in contracts and in individually determined rates be any less disruptive today if the Shipper Associations' unjustified request were granted?

The issue of requiring the rate bureaus to adopt mandatory automatic minimum discounts off the collectively set class rates likewise was rejected by the Board because it would place the

agency in the position of prescribing rates. As the Board recognized, there simply was no basis for setting a ceiling on the actual rate that a carrier could charge, which would be the result if it mandated a minimum discount provision. (See Nov. 20, 2001 Decision, pp. 6-7, and fn. 14) This record is equally devoid of any evidence that would justify such an onerous and unwarranted result.

Lastly, while the Shipper Associations seemingly compliment SMC on the "transparency" of its general rate proceedings, it criticizes SMC for not providing fuller advance notice to the public of the basis for proposed increases in bureau class rates. (SA Comments, p. 13) First, notice of all public meetings of the General Rate Committee is given at least 15 days prior to the meeting date. At the meeting any person in attendance is provided the very information the carriers have before them to consider any rate action that is proposed. Thereafter, a minimum of 15 days' notice is provided of the public meeting date at which the docketed proposal will be considered. At that time, as well, all persons participating in the meeting are provided all the information to be considered by the carriers in voting on the general rate action proposal. Any shippers interested in a general rate action, both before and after a proposal is docketed, not only have the opportunity to review the carriers' data but also can present their own comments.

Notwithstanding the "spin" that the Shipper Associations attempt to place on the benefit of the National Classification Committee's (NCC) procedures for providing information; namely, the purported identification of errors of fact and analysis, rather than enabling shippers to review information upon which the classification or reclassification of their product is based, ample opportunity is provided for interested persons to review the basis for SMC GRC collective rate actions. Moreover, unlike NCC data, which is related to the shippers' products, GRC data references industry average costs based on updates and surveys of individual carrier members. Much of that information is confidential and proprietary, and is not appropriate for widespread public dissemination. Sufficient access to that aggregated information is provided at the meeting which enables interested persons to understand the basis for the member carriers' collective action based upon industry average costs.

IV.
Conclusion

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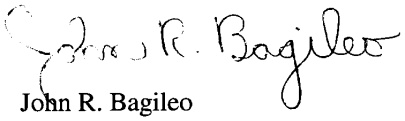
For all the foregoing reasons, it is submitted that there is no evidence of any practice by SMC which necessitates modification of its Section 5a Agreement in order to protect the public interest. SMC further submits that its member motor carriers strictly follow the procedures approved by the Board in conducting their collective ratemaking activities; that shippers and other interested persons at open meetings are provided full access to the very information and data which are relied upon by the member motor carriers in considering and establishing their general rate actions; and that the class rates established pursuant to those procedures reflect the industry average costs incurred by the member motor carriers and the general rate increases necessary to enable them to remain viable service providers. Therefore, it is requested that the Board renew its current Section 5a Agreement approved in October, 2003, Section 5a Application No. 46 (Sub-No. 21).

Respectfully submitted,



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